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Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1936.

No. 325

Monarch Conservatories Company, a Corporation, and Maynard Starr, of Kansas City, Missouri, a Corporation, *Petitioners*,

vs.

Mayflower Creamery Company, a Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

INDEX.

PAGE

Summary Statement of the Matter Involved..... 1-8

Reasons Relied on for Allowance of the Writ..... 9-17

Brief in Support of Petition for Writ of Certiorari..18-21

I. Opinion of Court Below..... 18

II. Jurisdiction 18

III. Statement of the Case..... 19

IV. Specification of Errors..... 19

Argument 22-41

III. Respondent having violated the maxim that he who seeks equity must do equity and that he who seeks equity must come with clean hands in that it had, though requested so to do, deliberately and intentionally refused to carry out its contract to deposit enough money in the M. & T. Trust Co. account to complete the plastering contract and the trial court having so found as a fact from the evidence before it and after having seen the witnesses and the parties and their counsel the act of the Court of Appeals in rendering its decree directing the trial court on remand to grant the relief of specific performance declared the law directly contrary to the way in which it has been declared by this and all the other courts..... 31

V. The contract as a whole undertook to assign a joint interest to the Maryland Casualty Company of all claims which the Construction Company might thereafter have against the Government arising out of the Batavia contract and was therefore void under the provisions of Section 203, Title 31, U. S. C. A..... 35

PAGE

VII. Respondent had no right to have the check or warrant impressed with a trust in its favor or in favor of persons supplying labor and materials since said check or warrant was received in the ordinary course of the contractor's business and constituted part of its resources in executing its contract with the United States. The statute prohibiting the assignment of claims against the Government denies such asserted right to respondent 39

Conclusion 42

Table of Cases Cited.

Alexander v. Cosden Co., 290 U. S. 484, l. c. 487 ..... 12, 25
Alexander v. Hamilton, 287 Fed. 508 15
American Surety Co. v. U. S., 76 Miss. 289, 24 So. 388 10

Backhurst v. Johnson, (C. C. A. 8) 72 F. (2d) 644 ..... 12, 25
Becker v. Becker, 250 Ill. 117, 95 N. E. 70 ..... 12, 27
Bolles v. Outing Co., 175 U. S. 562 ..... 11, 23
Bothewell v. U. S., 254 U. S. 231 ..... 11, 24

Cherokee Nation v. Black Feather, 155 U. S. 528 ..... 11, 24
Clory v. Foundry Co., 132 U. S. 612 ..... 11, 25
Cathcart v. Robinson, 5 Peters 264 13

Dalton Foundries, Inc., v. U. S., 56 Fed. (2d) 483 10
Dorsey v. Packwood, 12 How. 126 13

Fidelity & Deposit Company v. Buckley, 75 N. H. 506 9
Forsyth v. Hammond, 166 U. S. 506 16

H. M. O. Lumber Co. v. U. S., 40 Fed. (2d) 544 10

In re Hudford Co. of N. Y., 257 Fed. 722 10
In re Cargo of Intoxicating Liquors, 40 Fed. (2d) 72 10

TABLE OF CASES CITED—Continued.

PAGE

Jones Store Co. v. Dean, 56 F. (2d) 996 ..... 12, 25

Kane et al. v. First National Bank of El Paso, Texas, 56 Fed. (2d) 534 ..... 16, 39
Keystone Co. v. Excavator Co., 290 U. S. 240 ..... 28, 30, 31

Langley v. Devlin, 95 Wash. 171, 163 Pac. 395 ..... 12, 28
Levison v. Ill. Surety Co., 222 N. Y. 280, 118 N. E. 641 10

Magnum v. Coty, 262 U. S. 159 16
Merchant's S. Co. v. Johnson, 69 F. (2d) 940 ..... 12, 25
Midland Valley Ry. Co. v. Fulgham, (C. C. A. 8) 181 F. 91 11
Milward v. Vulcan Furnace Co., (C. C. A. 3) 26 F. (2d) 78 11
Moore v. Toplif, 107 Ill. 241 15
Morgan v. Morgan, 2 Wheaton 290 13
Morrison v. Burnette, (C. C. A. 8) 154 Fed. 617 11

National Bank of Commerce v. Downie, 218 U. S. 345, 54 Law Ed. 1065 ..... 10, 35
National Fire Ins. Co. v. Elliott, (C. C. A. 8) 7 F. (2d) 522 11

O'Neil v. Mining Co., 174 Fed. 527, l. c. 535 (C. C. A. 8) 11, 24, 25

Packard Motor Car Co. v. U. S., 59 Court Claims 354 10
Peoria & P. N. R. Co. v. U. S., 263 U. S. 528 ..... 11, 23

Rogers v. Mining Co., (C. C. A. 8) 154 Fed. 606 11
Rutland Marble Co. v. Ripley, 10 Wall. 339 13

Shubert v. Woodward, 167 Fed. 47, l. c. 57 31
Spofford v. Kirk, 97 U. S. 484, 24 L. Ed. 1032 ..... 10, 36
Swger v. Smith, (C. C. A. 4) 194 Fed. 762, l. c. 765 ..... 12, 24

Terminal R. Asso. v. U. S., 266 U. S. 17 11
The Maria Martin, 12 Wall. 37 ..... 11, 12

PAGE

U. S. v. Am. Exp. Co., 265 U. S. 125 ..... 11, 24
U. S. v. Gillis, 95 U. S. 407, 24 L. Ed. 503 ..... 10, 36

Weyerhaeuser Timber Co. v. First National Bank of Portland, 43 Pac. (2d) 1078 10

Statutes.

Section 3477, R. S. Mo. 1929 ..... 20, 35
Sec. 347, 28 U. S. C. A. 18
Section 203, Title 31, U. S. C. A. 9, 10, 39

Text Books.

2 R. C. L., page 182 25
2 Rul. Cas. L. 156 ..... 11, 24
58 C. J. 1141 15
50 C. J. 245 15

In the Supreme Court of the United States

October Term, 1936.

No.....

MORLEY CONSTRUCTION COMPANY, a Corporation, and MERCHANTS BANK OF KANSAS CITY, MISSOURI, a Corporation, *Petitioners,*

vs.

MARYLAND CASUALTY COMPANY, a Corporation, *Respondent.*

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully say:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Morley Construction Company, a corporation, entered into a contract with the United States Government to construct a Veterans hospital in the vicinity of Batavia, New York, for the sum of $540,000.00. The Maryland Casualty

Company, a corporation, and Surety Company, with the Construction Company, executed the performance bond (standard form), of $275,000.00 on July 28, 1932.

Morley Construction Company immediately engaged in the performance of the work. Thereafter due to labor troubles and the general banking situation early in 1933 and the failure of sub-contractors to perform their contracts and its financial condition the Construction Company could not proceed with the work. Thereupon and on the 28th day of April, officials of Morley Construction Company met with the Maryland Casualty Company's officials at Buffalo, New York, and entered into a contract to open a joint account which contract consisted of three documents all executed at the same time (R. 69). These documents consist of Exhibits "A" (R. 9), "B" (R. 11) and defendant's Exhibit 3 (R. 73-74). By the contract as expressed in these documents the Surety Company and its principal agreed that Morley Construction Company would open an account in a bank known as the M. & T. Trust Company, of Buffalo, New York, each depositing the sum of five thousand ($5,000.00) dollars to open it; that the Construction Company would deposit thereafter all moneys and checks received from the Government because of said work in said joint account and that the Maryland Casualty Company and the Construction Company would jointly own all sums deposited in said account (R. 74). It was also agreed that all checks on said joint account drawn by the Construction Company should be countersigned by the Surety Company's representatives. (R. 10.) It was also agreed that the Surety Company should (in addition to the initial deposit) deposit a sufficient sum of money to pay off all plasterers' claims unpaid and sufficient money to complete the plastering contract. (See Bill of Complaint, pp. 3-4.)

On June 21, 1933, the parties modified the agreement contained in Exhibits "A" and "B" and defendant's Exhibit 3. The parties then changed the account to a joint account in the names of H. F. Morley and the Maryland Casualty Company. The original account was that of the Morley Construction Company alone, with a countersignature. (R. 94-97-98.)

The Morley Construction Company thereafter proceeded with the work, completed the building, made a final settlement with the Government on November 9, 1933 (R. 92). The Maryland Casualty Company failed to deposit in the joint account sufficient money to complete the plastering contract as agreed by it. (R. 76-118.)

After the completion of the building Morley Construction Company and its officials left New York state and went to Kansas City, Missouri, their home. The balance found to be due by the final settlement, amounting to $59,780.82 (R. 7), a check or voucher for said amount was sent to the Construction Company by the Government and said voucher was given by the president of the Construction Company to petitioner Merchants Bank of Kansas City for the purpose of collection under an understanding that when collected the president (as trustee) should receive a cashier's check for the amount. The voucher was deposited by the Merchants Bank in the Federal Reserve Bank, but before it was paid the Casualty Company filed a suit in the Supreme Court of the District of Columbia and caused process to be served on the treasurer of the United States and an order made by said court in obedience to which the treasurer refused to pay the amount of the check or voucher. Two days afterwards and on the 27th of November, 1933, the Maryland Casualty Company filed its bill of complaint in the U. S. District Court at Kansas City, and later on March 3, 1933, filed an amended bill of com-

plaint in the United States District Court at Kansas City, Missouri (R. 13), in which it asked for the relief of specific performance of the contract entered into in April, 1933, between the parties and also subrogation and exoneration as surety.

In the bill of complaint the Casualty Company claimed that the Construction Company and its officers intended to use the proceeds of the voucher due from the Government for purposes other than paying labor and material claims and that they intended to conceal or fraudulently convey the same. (R. 7.)

Petitioners filed their joint and separate motion to dismiss answer and counterclaim on January 5, 1934, and refiled same on September 27, 1934. (R. 13-29.) The motion to dismiss was made on the grounds that the complaint in equity failed to state facts sufficient to constitute a cause of action or basis for relief against the defendants, or either of them.

The answer also alleged that Maryland Casualty Company had breached its alleged contract and forfeited all rights thereunder to have the amount of the voucher thereunder deposited and called attention to the failure of the bill of complaint to allege performance of the contract which the Maryland Casualty Company sought to have enforced and denied that the claim of the Construction Company for the amount due from the Government was or could be impressed with a lien or trust in favor of the Maryland Casualty Company. Also pointed out that the time given by the statute for the performance of the obligations of the contract and bond to pay laborers and materialmen had not expired when the suits were brought by the Maryland Casualty Company and that its acts prevented the Construction Company from collecting its obligations and paying its debts. (R. 21.) The counterclaim prayed that

the court direct the Casualty Company to dismiss its suit in the Supreme Court in the District of Columbia. (R. 21-22.)

The Maryland Casualty Company filed a reply on September 18, 1934 (R. 35), and an answer to the counterclaim. In said reply, amongst other things, the Maryland Casualty Company alleged:

> "* * * that the sole purpose of plaintiff's complaint is to require the defendants to deposit said money and to require its disbursement in accordance with said alleged contract." (R. 33.)

The cause was called for trial on September 27, 1934, by the District Court. (R. 54.) At the trial Maryland Casualty Company called the president of defendant Construction Company to the stand and his testimony established that the total amount of the assets over the obligations of Morley Construction Company was $23,598.84; that some of the assets consisted of claims against the defaulting bonding companies of sub-contractors; that the Construction Company had two claims against the New Amsterdam Casualty Company, one amounting to $19,919.11 and the other in the amount of $532.83; a claim against the Standard Accident Company in the amount of $521.00 and against the National Surety Company in the amount of $20,689.29. (R. 68.) The total amount of claims to be collected amounted to $42,791.23. The Construction Company desired to be permitted to collect those claims and to collect the amount due from the Government in addition, amounting to $59,780.82.

The evidence disclosed without contradiction that the Construction Company was endeavoring to complete its contract to pay the laborers and materialmen, as it had completed the contract to the satisfaction of the Govern-

ment with reference to that feature of the contract and that the acts of Maryland Casualty Company in bringing the suits in question had prevented it from collecting its debts and discharging its obligations. After hearing the evidence the trial court filed a memorandum opinion, findings of fact, conclusions of law and indicated decree. (R. 115-120.) The court found that:

> "* * * it was not the intention of the Construction Company nor its officers, when the bill was filed, to use the proceeds of the warrant referred to in Finding of Fact No. 4 for any other purpose than the payment of labor and material claims on the Batavia contract." (R. 118.)

It found also that:

> "The Construction Company never has received the final payment from the United States of $59,780.82 nor any part of it and cannot receive it until the restraining order issued by the Supreme Court of the District of Columbia is set aside by that court. The Casualty Company filed its bill in this case after it had filed its bill in the Supreme Court of the District of Columbia." (R. 117.)

The court also found,

> "Pursuant to the agreement all money which the Construction Company received from the United States under the contract, except the final payment of $59,780.82, were deposited in the joint account." (R. 117.)

The court further found that it was provided by the written agreement that Maryland Casualty Company would advance to the Construction Company and deposit in the said joint account a sufficient sum of money to pay off all

plasterers' claims unpaid and a further sufficient sum of money to complete the plastering. (R. 116.) The court also found that the time at which suits might be independently filed against Maryland Casualty Company, as surety for the Construction Company, on account of claims for unpaid labor and material bills

> "* * * had not yet arrived when the bill was filed." (R. 118.)

The court further found:

> "The Casualty Company did not itself discharge all of its obligations under that agreement." (R. 118.)

And that the Casualty Company was not entitled to a degree of specific performance or to the relief of subrogation. (R. 118.) It filed conclusions of law to this effect. (R. 119.) It found that the Construction Company was insolvent. (R. 118.) It, however, found that the Maryland Casualty Company was entitled to the relief of exoneration by defendant Construction Company. It found that the cross-bill should be dismissed. (R. 120.) A decree was thereafter filed. It rendered a decree giving effect to these findings of fact and conclusions of law. (R. 35-37.) This decree required the Construction Company to deposit the proceeds of the voucher, to-wit: $59,780.82, in some bank and to be designated a special trust fund for the payment of labor and materials on the Batavia contract, and to use:

> "All other assets of defendant Morley Construction Company which it now has or may hereafter acquire"

for the payment of the labor and material claims on the Batavia contract. An appeal from the decree was taken

to the United States Circuit Court of Appeals for the 8th Circuit. (R. 24.) The cause was argued on May 6th in that court and on the 22d of June, 1936, the court filed an opinion (R. 122, 132), together with its decree (R. 132-133), in which it directed that the cause be remanded to the District Court with directions for modification of the decree in accordance with the views expressed in the opinion of the court and as so modified the decree was affirmed.

The opinion of the court discloses that notwithstanding the trial court found against Maryland Casualty Company on the issue with reference to specific performance and that that company had failed to prosecute an appeal or cross-appeal from the decision against it and had failed to assign cross-errors and that Maryland Casualty Company had breached the contract it sought to have performed, yet the court of appeals held that the District Court was in error in denying the relief of specific performance and that it should have granted the relief of specific performance and in the opinion directed that the cause be remanded and the relief of specific performance granted to Maryland Casualty Company by the District Court on remand. The Court of Appeals also found that the trial court erred in granting the relief of exoneration to the surety upon the ground that it was not liable at the time the bill was filed and consequently was not entitled to the relief of exoneration.

Thereafter and in due time, to-wit: on July 7, 1936, petitioners filed a petition for rehearing (R. 147). Said petition for rehearing is found at R. 135 to 147. Thereafter and on July 20th, said petition for rehearing was denied. (R. 147.) Thereafter, the motion for stay of issuance of mandate was filed (R. 147-148) on July 30, 1936, and on August 3, 1936, an order staying the issuance of the mandate was made for thirty days.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The fact that the Construction Company's entire assets were tied up by the decrees of the courts below and by the suits in the District of Columbia and Kansas City brought by the Maryland Casualty Company nearly six months before its liability could accrue on the performance bond caused a loss to the Morley Construction Company in excess of forty-two thousand ($42,000.00) dollars by preventing it from realizing on its claims against the bonding companies of subcontractors and others and in effect deprived it of its property contrary to the command of the Fifth Amendment and it was unjust and inequitable under all the authorities and unless the Construction Company can get relief in this court it will sustain such a total loss. *Fidelity & Deposit Company* v. *Buckley,* 75 N. H. 506.

II.

The contract consisting of the three instruments executed on April 28, 1933, Exhibits A, B and Defendant's Exhibit 3 (R. 74), was a contract by virtue of which the Maryland Casualty Company sought to acquire by transfer or assignment an interest in a claim against the Government, in violation of Section 203, Title 31, U. S. C. A. As the contract was illegal and void it cannot be enforced and the opinion and decision of the Court of Appeals is in conflict with the following opinions of this court:

National Bank of Commerce v. *Downie,* 218 U. S. 345, 54 Law Ed. 1065;
Spofford v. *Kirk,* 97 U. S. 484, 24 L. Ed. 1032;
American Surety Co. v. *U. S.,* 76 Miss. 289, 24 So. 388;
U. S. v. *Gillis,* 95 U. S. 407, 24 L. Ed. 503.

III.

As the contract of April, 1933, was in violation of Section 203, Title 31, U. S. C. A., prohibiting transfers and assignments of claims upon the United States, the opinion and decision of the Circuit Court of Appeals for the Eighth Circuit is in conflict with the following opinions and decisions of the Circuit Courts of Appeal for other circuits and of many state courts in the following cases:

In re Hudford Co. of N. Y., 257 Fed. 722;
Levison v. *Ill. Surety Co.,* 222 N. Y. 280, 118 N. E. 641;
Weyerhaeuser Timber Co v. *First National Bank of Portland,* 43 Pac. (2d) 1078;
Packard Motor Car Co. v. *U. S.,* 59 Court Claims 354;
In re Cargo of Intoxicating Liquors, 40 Fed (2d) 72;
H. M. O. Lumber Co. v. *U. S.,* 40 Fed. (2d) 544;
Dalton Foundries, Inc., v. *U. S.,* 56 Fed. (2d) 483.

IV.

The decision of the trial court was against Maryland Casualty Company on the issue of specific performance. Maryland Casualty Company did not appeal from said decision, nor assign cross-errors and hence the Court of Appeals was without jurisdiction to reverse the decree

of the trial court denying specific performance and to modify same by directing that the relief of specific performance be granted and the decision of the Circuit Court of Appeals is in conflict with the following opinions of this court and the general law on that question:

The Maria Martin, 12 Wall. 37;
Peoria & P. N. R. Co. v. *U. S.,* 263 U. S. 528;
Bolles v. *Outing Co.,* 175 U. S. 562;
2 Rul. Cas. L. 156;
U. S. v. *Am. Exp. Co.,* 265 U. S. 125;
Cherokee Nation v. *Black Feather,* 155 U. S. 528;
Bothewell v. *U. S.,* 254 U. S. 231;
Terminal R. Asso. v. *U. S.,* 266 U. S. 17;
Clory v. *Foundry Co.,* 132 U. S. 612.

IV.

The jurisdiction of the Circuit Court of Appeals is exclusively appellate. It had, therefore, no jurisdiction to reverse the action of the trial court in denying the relief of specific performance to the appellee since the appellee had not appealed and its decision and opinion on that point is in conflict with the following decisions of said and other Circuit Court of Appeals on the same question:

O'Neil v. *Mining Co.,* 174 Fed. 527, l. c. 535 (C. C. A. 8);
Rogers v. *Mining Co.,* (C. C. A. 8) 154 Fed. 606;
Morrison v. *Burnette,* (C. C. A. 8) 154 Fed. 617;
Midland Valley Ry. Co. v. *Fulgham,* (C. C. A. 8) 181 F. 91;
National Fire Ins. Co. v. *Elliott,* (C. C. A. 8) 7 F. (2d) 522;
Milward v. *Vulcan Furnace Co.,* (C. C. A. 3) 26 F. (2d) 78;

Swger v. *Smith,* (C. C. A. 4) 194 Fed. 762, l. c. 765;
Backhurst v. *Johnson,* (C. C. A. 8) 72 F. (2d) 644;
Merchant's S. Co. v. *Johnson,* 69 F. (2d) 940;
Jones Store Co. v. *Dear,* 56 F. (2d) 996;
Alexander v. *Cosden Co.,* 290 U. S. 484, l. c. 487.

VI.

The facts stated in the opinion of the Court of Appeals alone discloses that Morley Construction Company had repeatedly requested the Maryland Casualty Company to perform its contract to place enough money in the joint account to complete the plastering contract and that Maryland Casualty Company refused so to do and there is nothing in the record, nor in the opinion of the Court of Appeals, that warrants any inference that there was a modification of the contract or any acquiescence in such modification on the part of the Morley Construction Company. The very opinions cited by the Court of Appeals on the question of acquiescence, to-wit,

Becker v. *Becker,* 250 Ill. 117, 95 N. E. 70;
Langley v. *Devlin,* 95 Wash. 171, 163 Pac. 395 (R. 126);

are not opinions which justify its conclusion with reference to acquiescence and its conclusion that the Construction Company acquiesced in a breach or modification of the contract by the Maryland Casualty Company is wholly unjustified and is merely an arbitrary and capricious decision of the Circuit Court of Appeals.

VII.

The opinion of the Court of Appeals holding that the contract could be enforced conflicts with the opinions of this court.

Cathcart v. *Robinson*, 5 Peters 264;
Rutland Marble Co. v. *Ripley*, 10 Wall. 339;
Dorsey v. *Packwood*, 12 How. 126;
Morgan v. *Morgan*, 2 Wheaton 290.

This for the reason that Morley Construction Company could not have any relief in equity against the Maryland Casualty Company at the time said Company filed its bill to compel it to deposit enough to complete the plastering contract. That entire burden was cast upon the Construction Company and the fact that the Casualty Company failed to pay the money was in itself absolute proof of the damage and injury sustained by the Construction Company.

VIII.

The act of the respondent in tying up the proceeds of the voucher was an act in conflict with the duty of Maryland Casualty Company as surety and amounted to a breach of its contract of suretyship and hence it was not entitled to any relief for the reason that its wrongful conduct has compelled a breach of the performance bond (*S. W. Surety & Ins. Co.* v. *Wells*, 217 Fed. 294; *McElroy* v. *Hathaway*, 6 N. W. 876, per Cooley, J.; *American Bonding Company* v. *Logansport & W. Valley Gas Co.*, 95 Fed. 96.)

IX.

The bill of complaint sought the enforcement of the contract in writing marked Exhibit "A" by virtue of which Morley Construction Company was to open an account. According to the tenor of Exhibit "A" the account was to be the account of Morley Construction Company, subject to the joint control of the parties. This is the contract sought to be enforced but Defendant's Exhibit 3, dated April 29, 1933, modified Exhibit "A" by providing that the moneys should be the joint property of Morley Construction Company and Maryland Casualty Company and that the account should be in all respects a joint account. It was stated that this agreement was made on the same day as the other agreement (R. 69). It further appears that there was a further modification of the contract to the effect that on June 21, 1933, to a joint account in the name of H. F. Morley and the Maryland Casualty Company. Exhibit 3 and the modification changing the names of the parties to the account and providing that it should be the joint property of the parties amounted to a modification and change of the contract sought to be enforced and deprived the court of jurisdiction to enforce it. (See R. 94 and Exhibits at R. 97-98.)

X.

Notwithstanding the allegation in the bill of complaint that property within the jurisdiction of the District Court of the United States for the Western District of Missouri was involved, yet the evidence disclosed that the only property involved was the amount of the voucher which the Treasurer of the United States refused to pay and

this fact is conclusively admitted by respondent's reply brief. It, therefore, follows that there was no property within the jurisdiction of the District Court to which the jurisdiction of said court as a court of equity could attach and since some of the acts to be performed with reference to property beyond the jurisdiction of the District Court were acts of the M. & T. Trust Company and its employees who were not parties, the District Court was without jurisdiction to grant the decree of specific performance under the general law well stated in *Alexander* v. *Hamilton,* 287 Fed. 508.

XI.

The pleadings and the evidence disclosed that the M. & T. Trust Company of Buffalo, N. Y., was not a party to the suit in the courts below, nor were the representatives of the respondent, specified in Exhibit "A," and in view of the fact that said M. & T. Trust Company and said Kelly and Schaus must exercise their discretion in the performance of their duties with reference to disbursement of the funds and as the District Court has no jurisdiction to superintend the disbursement of the fund, it follows that it has no jurisdiction to tender a decree impounding the fund and placing it under the control of parties over whom the District Court had no control and that the decision of the District Court undertakes to compel it to do that which it is without jurisdiction to do. *Alexander* v. *Hamilton,* 287 Fed. 508; *Moore* v. *Toplif,* 107 Ill. 241; 58 C. J. 1141; 50 C. J. 245.

XII.

The mere fact that the Maryland Casualty Company was a surety for the Construction Company did not give it any right to interfere with the contractor's right to use the money or checks received by it from the United States in any manner that it saw fit prior to the day on which the liability of the Surety Company attached, or six months after the final settlement. *Kane et al.* v. *First National Bank of El Paso, Texas,* 56 Fed. (2d) 534.

XIII.

Under the construction given to the statute giving this court jurisdiction on certiorari to review decisions of the Circuit Courts of Appeals, as stated by Justice Brewer in *Forsyth* v. *Hammond,* 166 U. S. 506, to-wit:

> "Nine separate appellate tribunals might by their difference of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision.

And as stated by Chief Justice Taft in *Magnum* v. *Coty,* 262 U. S. 159, it is said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

And as stated in Rule 38 of this court, this is a case peculiarly calling for the exercise of the discretion vested in this court by the statute to issue the writ prayed for.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the 8th Circuit and of the case numbered and entitled on its docket No. 10477, in equity, *Morley Construction Company, a corporation, and Merchants Bank of Kansas City, Missouri, a corporation, appellants,* v. *Maryland Casualty Company, a corporation, appellee,* to the end that cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated August 28, 1936, at Kansas City, Missouri.

Morley Construction Company, a corporation, and Merchants Bank of Kansas City, Missouri, a corporation, Petitioners, by

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the 8th Circuit is not yet reported. It is found at pages 122 to 132, inclusive, of the record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is June 22, 1936. A petition for rehearing was filed in accordance with the rule of said Circuit Court of Appeals and denied on the 20th day of July, 1936.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the following: Sec. 347, 28 U. S. C. A., providing:

> "* * * in any case, civil or criminal, in a Circuit Court of Appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree of such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal." (Which said statute in its present form was adopted February 13, 1925, 43 Stat. 938.)

III.

Statement of the Case.

This has already been stated in the preceding petition. Said petition is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the judge of the District Court should have granted the relief of specific performance to appellee and this notwithstanding it appeared that the appellee was satisfied with the decision against it on the issue of specific performance and failed to appeal from the said decision and failed to assign cross-errors.

2. The Circuit Court of Appeals erred in holding that notwithstanding the bill of complaint of appellee failed to allege that it had performed the contract on its part which it sought to have enforced, yet the Circuit Court of Appeals held in its opinion that the trial court had jurisdiction to grant the relief of specific performance notwithstanding the said omission in the petition.

3. The Court of Appeals erred in holding that the trial court properly overruled petitioners' motion to dismiss the bill of complaint.

4. The Court of Appeals erred in holding that notwithstanding the record shows that appellee failed to deposit even one-half of the amount it agreed to deposit in the joint account, yet that by depositing less than one-half of the amount agreed to be deposited the appellee had substantially performed its contract.

5. The Court erred in holding that notwithstanding it found and the record disclosed that petitioner had repeatedly requested the appellee to perform its contract and that it had refused to do so, yet that because petitioner did not again make a request which had been theretofore denied and declined that it had thereby modified or agreed to a modification of the contract on which the bill of complaint was founded.

6. The court erred in that it held contrary to the decisions of this court and contrary to the law governing it that notwithstanding the pleadings and the evidence disclosed that the Maryland Casualty Company had deliberately and intentionally breached its contract and also its surety contract and failed to comply with petitioners' request to perform it that yet respondent was entitled to the relief of specific performance, notwithstanding respondent had waived any right to complain of error in the Court of Appeals by failing to appeal from the decision on the point against it.

7. The Court of Appeals erred in holding that the Maryland Casualty Company and the Morley Construction Company made a contract which would operate to give the Maryland Casualty Company a right to have a legal or equitable interest in a claim of the petitioner against the United States, notwithstanding Section 203, Title 31, U. S. C. A., same being R. S. 3477, prohibited any transfer or assignment of any reason, legal or equitable, in any claim against the Government.

8. The Court of Appeals erred in that notwithstanding it appeared from the pleadings and the evidence and the findings of the court below and the findings of the trial court and also the findings of the Circuit Court of Appeals, that the contract sought to be enforced was a con-

tract which was made by the parties in violation of the express terms of the statute, to-wit: Section 203, Title 31, U. S. C. A., and notwithstanding it appeared that even if Exhibit "A" had been a lawful contract that the appellee had failed to perform the obligations thereof on its part and thus and thereby violated it and forfeited any rights thereunder and notwithstanding respondent Maryland Casualty Company had failed to appeal from the decision on the issue of specific performance against it or on any issue and was satisfied with the decree of the trial court, yet the Circuit Court of Appeals transcended in the extent and character of its decision and judgment the law which was applicable to the case and to the Court of Appeals and to the record before it.

ARGUMENT.

The reasons given in the petition for the writ, together with those set forth in the motion for a rehearing (R. 135-146) so plainly state the position of the petitioner and show petitioner's right to have the writ prayed for issued that petitioner waives argument except as follows:

I.

The act of the court of appeals in reversing the decision of the trial court denying specific performance was an act which it was not authorized to do under the law applicable to the court and to the issues for the reason that respondent was defeated in the trial court by the denial of the prayer for specific performance and as it did not appeal from the decision and decree of the trial court, then the court of appeals had no jurisdiction, right, power or authority to reverse the decree or to modify the decree so as to change it from a denial of specific performance and a direction to the trial court to grant specific performance. In *The Maria Martin* v. *Trans. Co.*, 12 Wall. 37, 20 Law Edition, 251, the court said (leading case on the point):

> "Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right the other cannot assign error in the appellate court; and the same right to remove the cause from the subordinate to the appellate court for re-examination is secured to both parties by the act of Congress allowing appeals, instead of writs of error, *in cases of equity* or of admiralty and maritime *jurisdiction,* or of prize or no prize, as provided in the 2d section of the act allowing such appeals. 1 Stat. at L. 84; 2 Stat. at L. 244. Subject to the same rules and

regulations as in case of writs of error, both parties may appeal, *in an equity,* admiralty or prize suit, from the final decree of the subordinate court, *but the appeal, when entered in the appellate court, is also subject to the same restrictions as are prescribed in case of writs of error.* Where each party appeals, each may assign error; but *where only one party appeals, the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken.*" (Italics ours.)

This Hornbook Rule has never been departed from by this court, nor by any of the other courts of appeal of the other circuits and never was departed from by the Court of Appeals until this case came before it.

In support of this statement, we direct attention to the decision in *Peoria & Pekin U. R. Co.* v. *United States of America et al.,* 263 U. S. 528, 68 Law Edition 427, l. c. 431, where the court said:

"* * * by failure to enter a cross-appeal from the court's action in overruling its objection, the right to insist upon it here was lost. The appellees can be heard before this court only in support of the decree which was rendered. *The Maria Martin* (*Martin* v. *Northern Transp. Co.*), 12 Wall. 31, 40, 20 L. ed. 251, 252; *Bolles* v. *Outing Co.,* 175 U. S. 262, 268, 44 L. ed. 156, 158, 20 Sup. Ct. Rep. 94.)"

In *Bolles* v. *Outing Co.,* 175 U. S. 262, 44 Law Edition 156, the court ruled:

"It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below. (Citing *Maria Martin.*)"

In *O'Neil* v. *Mining Co.*, 174 Fed. 527, l. c. 535, the inimitable Judge Walter Sanborn said:

> "* * * as the defendants have taken no appeal they cannot be heard in the court to urge that this court should set aside the judgment in their favor. They can present contentions that will support the decree and those only. An appellee or a defendant in error who takes no appeal or writ of error himself cannot by assigning cross-errors *or by brief or argument* confer jurisdiction on a federal appellate court to consider, review, or decide rulings against him in the court below. Much less can he be heard to challenge rulings that were too favorable to him. Cross-errors are not assignable in the national courts. (Citing acres of cases.)"

2 Ruling Case Law, 156, cites *O'Neil* v. *Wolcott Mining Co., supra,* as the original leading case in support of the following text:

> "* * * a party who has not appealed cannot ask of an appellate court a judgment more favorable to himself than the one he obtained in the court below."

The Court of Appeals in this instance granted respondent a judgment more favorable to it than the one obtained in the court below, thus running counter to the law which created and limited its jurisdiction. The same rule was recognized in *U. S.* v. *American Express Co.*, 265 U. S. 125; *Cherokee Nation* v. *Black Feather,* 155 U. S. 528; *Bothwell* v. *U. S.*, 254 U. S. 231, 39 A. L. R. 56.

The Court of Appeals for the 4th Circuit, in *Swger* v. *Smith,* 194 Fed. 762, l. c. 765, held:

> "The appellees have not taken a cross-appeal. Mere assertion of error in an appellee's brief does not give this court jurisdiction to review alleged error against an appellee."

We respectfully submit that the foregoing is in direct conflict with the decision herein.

In 2 R. C. L., page 182, it is said:

> "* * * the appellee or defendant in error who has not appealed or sued out a writ of error cannot assign error, the right to assign errors being restricted to the appellant or plaintiff in error."

This same rule was curtly stated in *Clory* v. *Foundry Co.*, 132 U. S. 612.

See also the decisions of this court in *Blackhurst* v. *Johnson*, 72 Fed. (2d) 644; *Merchants S. Co.* v. *Johnson*, 69 F. (2d) 940; *Jones Store Co.* v. *Dean*, 56 F. (2d) 996; *O'Neil* v. *Wolcott Mining Co.*, 174 F. 527.

In *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 78 Law Edition 452, Mr. Justice Van Devanter said:

> "The discussion in the briefs make it advisable to point out at the outset that we have no occasion to re-examine the third and fourth claims. In the District Court each of these claims was allowed in part and rejected in part. The defendant alone appealed. In the Court of Appeals the third claim was rejected and the award on the fourth reduced. The defendant alone petitioned for a review here. In this situation the plaintiff is not entitled to be heard in opposition to the parts of the decision of the Court of Appeals which were adverse to it—as were the rejection of the third claim and the reduction of the award on the fourth—but only in support of the parts which were in its favor. As to the former it has acquiesced and become concluded by not seasonably petitioning for a review."

In the margin the leading authorities on the question here involved are cited, all of which demonstrate that the only question before the Court of Appeals for its determination was the ruling of the trial court with reference to the question as to whether or not the respondent was entitled to the relief of exoneration and since the court has properly found that it was not entitled to that relief, then it necessarily follows that the Court of Appeals should have reversed the judgment of the trial court with directions to dismiss the bill of complaint with directions to direct the appellee to dismiss its suit pending in the Supreme Court of the District of Columbia so that the Construction Company could use enough of its funds to recover against the defaulting sub-contractors and their surety companies.

II.

Notwithstanding it appeared from the opinion of the Court of Appeals that Morley Construction Company, through its president, repeatedly demanded that Maryland Casualty Company comply with its contract to deposit in the joint account enough money to complete the plastering contract, and that its representative, in response thereto, said:

> "• • • that the Maryland Casualty Company was not going to put any more money into that account or that job" (R. 125),

thus and thereby refusing to carry out his contract, yet the Court of Appeals held that such conduct on the part of the Construction Company in itself showed acquiescence by the Construction Company in the refusal of its request by Maryland Casualty Company. The Court of

Appeals cites the opinion from *Becker* v. *Becker,* 250 Ill. 117, 95 N. E. 70, as an authority supporting the singular decision of the Court of Appeals, but that case has no application whatsoever and is no authority for the extraordinary and arbitrary ruling on this question by the Circuit Court of Appeals. In that case, the suit was not for specific performance of a contract. On the contrary it was a partition suit by the heirs of a wife who was a party to an antenuptial agreement providing that her husband should keep his life insured for a specific sum in favor of his intended wife and that in case she died before he did that all her separate property should go to him and to his heirs. She died before he did and her heirs brought a partition suit naming the husband as a defendant. It appeared that the husband did not keep his life insured up to the time of his wife's death. The court, however, held that the heirs were estopped to claim that the contract was avoided by this failure on the following statement in the opinion:

> "The evidence in this case is uncontradicted that Mrs. Mishler made repeated declarations that she did not need life insurance; that she had money enough to live on and did not believe in life insurance; that the premiums paid therefor were a waste of money; that, after the insurance company in which her husband had his insurance became insolvent, she protested against his taking out other insurance for her benefit; *and that appellee acting on these repeated statements of his wife, did not take other insurance for her benefit.* * * * the uncontradicted evidence she did so insist and that her wishes in this regard were respected and carried out by the appellee. Her heirs should therefore, in equity, be estopped from taking any advantage of appellee's failure to continue the insurance for his wife's benefit."

That statement of the facts and the equity rule applied in that case demonstrates that the Illinois court recognized that if the wife had demanded repeatedly, as had the president of the Construction Company here, that the husband live up to his contract and procure the necessary insurance, then the heirs would not have been estopped to raise the question and so said decision as applied to the facts stated in the opinion, as well as the facts herein, is in direct conflict with the opinion of the court.

Langle v. *Devlin,* 59 Wash. 171, 163 Pac. 395, is no authority whatsoever for the extraordinary ruling of the Circuit Court of Appeals on this point. On the contrary, said opinion gives full effect to the clean hands doctrine and to the maxim that he who seeks equity must do equity and announces the law as this court announced it in *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240. In fact, the Court of Appeals itself recognized that on the facts stated that is apparent to any person that it was rendering a decision in conflict with the opinion in this court in *Keystone Co.* v. *Excavator Co., supra,* for it put the following paragraph in the opinion:

> "We do not wish it to be thought that we are departing from the well-established rules regarding the granting of the remedy of specific performance. Such is not our intention" (R. 126).

We respectfully submit that it is a legal principle that no person can be heard to say that he did not intend to do that which his acts conclusively show that he did intend and which his acts conclusively show that he intended to do. This principle applies in every field of law

and we respectfully submit that it ought to apply to the Circuit Court of Appeals and it ought not to be heard to say that it did not intend to depart in this case from the well-established rules regarding the remedy of the granting of specific performance. For it is manifest on the facts stated in the opinion and in the record with reference to this matter that the Court of Appeals could not have written and filed the opinion which it did if it did not intend to depart *in this case* from the well-established rules regarding the remedy of specific performance. The opinion states that it was not their intention to do so, but the physical facts show that they were misled or in error as to what their intention was. It is evident that the conception of the Circuit Court of Appeals as to the meaning as to what constitutes acquiescence is contrary to the generally accepted notion on the question. We can readily understand how a strong man requested by a weaker person to do something and refused to do so might think that because the person making the request did not shoot at him that he thereby acquiesced. The Court of Appeals has evidently applied this sort of analogy in determining the question as to whether or not the Construction Company acquiesced in the breach. We respectfully submit that this conclusion ought not to be approved by this court and that to permit this opinion to stand will unsettle rights and unsettle the law on this very important question unless corrected for it is in conflict with all the law on the question and should be corrected.

The opinion of the Court of Appeals is in conflict with the legal principle declared by this court and by other courts of appeal and by the courts generally that a person will be conclusively presumed to have intended the

natural consequences of his act and consequently the Circuit Court of Appeals for the Eighth Circuit has stated facts in the opinion which shows that the president of the Morley Construction Company repeatedly requested the Maryland Casualty Company to comply with its contract to deposit enough in the joint account to complete the plastering contract and that at the last interview the Maryland Casualty Company stated that it was not going to put any more money into that account or into that contract and that these facts made it impossible for the Court of Appeals under the rules with reference to specific performance to hold that the Construction Company had acquiesced in the breach of the contract.

The opinion of the Court of Appeals under the physical facts showing that the Maryland Casualty Company had deliberately refused to perform its contract to deposit enough in the joint account to complete the plastering contract and that it had deposited little more than one-third of the amount agreed by it to be deposited and that it arbitrarily did so after having been requested by the Construction Company so to do was an act which was wrong, both morally and legally, and that said act was in violation of the maxims that he who seeks equity must do equity and he who seeks equity must have clean hands and in conflict with the opinion of this court in *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, and the wealth of authority in 4 A. L. R., l. c. 73.

III.

Respondent having violated the maxim that he who seeks equity must do equity and that he who seeks equity must come with clean hands in that it had, though requested so to do, deliberately and intentionally refused to carry out its contract to deposit enough money in the M. & T. Trust Co. account to complete the plastering contract and the trial court having so found as a fact from the evidence before it and after having seen the witnesses and the parties and their counsel the act of the Court of Appeals in rendering its decree directing the trial court on remand to grant the relief of specific performance declared the law directly contrary to the way in which it has been declared by this and all the other courts.

In *Shubert* v. *Woodward,* 167 Fed. 47, l. c. 57, Judge Sanborn said:

> "It is an indispensable condition of a decree for the specific performance of a contract and of the issue of an injunction against its breach that the moving party has not been guilty of a substantial violation of it himself. *He who seeks equity must come into court with clean hands.*" (Italics ours.)
>
> "Whenever there is anything in a lawsuit which with reference to which the plaintiff is unclean he must be denied relief by a court of conscience and of equity."

In *Keystone Co.* v. *Excavator Co.,* 290 U. S. 240, the court said (l. c. 241):

> "The question presented is whether the Circuit Court of Appeals rightly applied the maxim, He who comes into equity must come with clean hands."
>
> * * * * * * *
>
> "Plaintiff contends that the maxim does not apply unless the wrongful conduct is directly connected

with and material to the matter in litigation and that where more than one clause is joined in a bill and plaintiff is shown to have come with unclean hands in respect of only one of them, the others will not be dismissed.

"Whenever a party who, as *actor,* seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct then the doors of the court will be shut against him *in limine;* the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy." (Italics ours.)

Courts of equity close their doors

"* * * only for such violations of conscience as in some *measure affect the equitable relations between the parties in respect of something brought before the court for adjudication.*" (Italics ours.)

Thereupon the court affirmed the judgment in 62 F. (2d) 48, where it was said:

"Any really unconscientious conduct connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience."

"It is enough * * * that the wrongful conduct was in regard to, and directly connected with, *one of the matters in litigation.*" * * * (Italics ours.)

"Under the above-stated principles we are of the opinion that the plaintiff should have been denied relief in a court of equity."

The petition alleged "by said contract plaintiff * * * agreed to place in said account * * * *sufficient money to*

complete the plastering contract'' (R. 3-4, par. 6). It did not allege performance. The contract, fifth paragraph, provided ''The Maryland Casualty Company further agrees to place on deposit in said account * * * sufficient money to complete the Giamberdino plastering contract'' (R. 10-11). The evidence was that it did not perform (R. 76). The court found in finding of fact 2 that plaintiff agreed to deposit in said account ''a further sufficient sum of money to complete the plastering'' (R. 116). The court found (F. F. 3; R. 117) that plaintiff ''did not deposit in the joint account a sufficient sum of money to complete the plastering contract.'' The court's opinion is, ''Nor, in my view of the case, is the plaintiff entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2. *The plaintiff did not itself discharge all of its obligations under that agreement''* (R. 118). ''Conclusion of Law 1, the plaintiff is not entitled to a decree of specific performance of the agreement referred to in finding of fact No. 2'' (R. 119). Plaintiff solemnly admitted in its reply ''that the sole purpose of plaintiff's complaint is to require the defendant to deposit said money and to require its disbursement in accordance with said alleged contract.'' Notwithstanding the findings of fact and law the decree was directly in conflict therewith, for it ordered ''that defendant Morley Construction Company shall deposit the proceeds from said United States Treasury Warrant No. 2213155 in some bank and such deposit shall be designated as a special trust fund for the payment of bills for labor and materials used on the United States Veterans Hospital in Batavia, New York'' (R. 36). The relief sought by the bill was with reference to said check or warrant (R. 5-6-7-8).

The plaintiff as "actor" breached its contract. Its conduct was unconscionable (*Shubert* v. *Woodward,* 167 Fed., l. c. 57). That unconscionable conduct affected "the equitable relations between the parties in respect of something brought before the court for adjudication" within the rule stated in 290 U. S. 240. The "something" was the "warrant or check." It was with reference to that "something" that the decree gave specific relief, contrary to the rule. That breach or wrongful conduct made plaintiff's "hands unclean" (167 Fed. 57). It was "wrongful conduct in regard to and directly connected with one of the matters in litigation." In fact, it was the one matter in litigation. That conduct should have repelled plaintiff "from the forum whose very foundation is good conscience" (290 U. S. 240).

IV.

The alleged contract as embodied in Exhibit "A" was the particular instrument which the Maryland Casualty Company sought to have enforced. It omitted to disclose to the trial court in its pleading that said Exhibit "A" was not all of the contract or that if it were then that it was modified by Exhibit 3 (R. 73), dated April 29, 1933, but executed on the same day (R. 69) as Exhibit "A," by virtue of which whatever sum was deposited in said account became the joint property of the Maryland Casualty Company and the Morley Construction Company and respondent further failed to disclose to the court in its petition that the agreement mentioned in both those instruments was modified by the agreement of June 21, 1933, changing or substituting the name of H. F. Morley for that of the Morley Construction Company. The original account was that of the Morley Construction

Company, alone, with counter-signature (R. 84), and this was opened in accordance with the terms of Exhibit "A." This, according to the defendant's banker and witness, was changed on June 21, 1933, to a joint account in the name of H. F. Morley and Maryland Casualty Company. It thus appears that the Maryland Casualty Company was not frank with the chancellor, did not disclose all the facts, and the evidence disclosed that the contract which it sought to have enforced, to-wit: Exhibit "A," dated April 28, 1933, was changed and modified by Exhibit 3 (R. 73); and that it was further modified on June 21st by substituting H. F. Morley for the Morley Construction Company and changing it to a joint account. These facts operate to deprive the trial court and the Circuit Court of Appeals of jurisdiction to enforce the agreement specified in Exhibit "A."

V.

The contract as a whole undertook to assign a joint interest to the Maryland Casualty Company of all claims which the Construction Company might thereafter have against the Government arising out of the Batavia contract and was therefore void under the provisions of Section 203, Title 31, U. S. C. A.

Section 203, *supra,* is the same as Section 3477, R. S. Mo. 1929, which was under judgment in the case of *National Bank of Commerce* v. *Downie,* 218 U. S 345. In that case this court held that where one party loans money to another and makes a contract or takes an assignment seeking to give it some interest in a claim against the Government as security the contract or assignment is void, both at law and in equity.

"Turning to § 3477, we find Congress had in mind not only *all* transfers and assignments of *any* claim on the United States, or part of a claim or *any interest therein,* whether the transfer or assignment be absolute or unconditional, and *whatever was the consideration of the transfer or assignment,* but all powers of attorney, orders, or other authorities for receiving payment of any such claim, or *of any part or share thereof.* All such transfers, assignments, powers of attorney, orders, or authorities are declared to be 'absolutely null and void,' except there be a compliance with the conditions fully set out in the statute. None of those conditions were complied with in these cases.

In *United States* v. *Gillis,* 95 U. S. 407, 24 L. Ed. 503, it appears that suit was brought in the court of claims, by the assignee of an unallowed claim on the United States, and the question arose whether the assignee could maintain a suit in his name for the proceeds of the claim. The court of claims sustained the assignee's right to sue, but this court, upon careful examination of the Act of 1853, re-enacted in § 3477 of the Revised Statutes, reversed the judgment, and directed the petition of the assignee to be dismissed. It was contended in that case that the Act of 1853 had reference only to claims asserted before the Treasury Department. But that view was rejected. After observing that the comprehensive provisions of the statute excluded any exceptions to the rule presented, the court said: 'We think, therefore, the Act of 1853 is of universal application, and covers *all claims* against the United States *in every tribunal in which they may be asserted.* And such, we think, was the understanding of Congress when the Revised Statutes were enacted. In the revision, the Act of 1853 was included and re-enacted.'

Among the earlier cases on the general subject is *Spofford* v. *Kirk,* 97 U. S. 484, 488-490, 24 L. Ed. 1032, 1034, 1035, frequently referred to in later decisions and always followed.

That was a case of a suit by Spofford, in the Supreme Court of this district. He became the holder, by assignment, of certain acceptances which, upon their face, provided for payment to be made out of any moneys received from the United States on the claim of one Kirk *against the Government*. The assignee or holder of the acceptances paid value for them, and acted in entire good faith. The question was whether an assignment of a claim against the United States, made before the claim had been allowed, and before a warrant had been issued for its payment, had *any validity, either in law or in equity*. The court of original jurisdiction dismissed Spofford's bill, and the judgment was affirmed here. Mr. Justice Strong, speaking for this court, referred to § 3477 of the Revised Statutes, and, among other things, said: 'It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and *incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.*' After referring to the fact that the court had not been called upon to decide in the Gillis Case, whether the assignment there involved was invalid as between the assignor and the assignee, the opinion proceeds: 'But if, after the claim in this case was allowed, and a warrant for its payment was issued in the claimant's name, as it must have been, he had gone to the Treasury for his money, it is clear that *no assignment he might have made, or order he might have given, before the allowance, would have stood in the way of his receiving the whole sum allowed.* The United States must have treated as a nullity any rights to the claim asserted by others. It is hard to see how a transfer of a debt can be of no force as

between the transferee and the debtor, and yet effective as between the creditor and his assignee to transmit an ownership of the debt, or create a lien upon it. Yet if that might be, and we do not propose now to affirm or deny it, the question remains, whether the act of Congress was not intended to render *all* claims against the Government, *inalienable alike in law and in equity, for every purpose, and between all parties.* The intention of Congress must be discovered in the act itself. * * * We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the Government. It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was therefore rightly dismissed.' "

VI.

The opinion of the Court of Appeals, holding that the Maryland Casualty Company was not guilty of a substantial breach of its contract is in direct contrast and conflict with the contract made by the parties themselves, for it was specifically stated therein and admitted in the bill of complaint by the Maryland Casualty Company that it had solemnly agreed to deposit enough money in the account to pay for the completion of the plastering contract (R. 3-4) and the opinion of the Court of Appeals finds that that statement is true, and the opinion of the Court of Appeals finds, as does the opinion

of the District Court, and the facts sustain the conclusion that the Maryland Casualty Company failed to carry out its contract, and hence the Court of Appeals had no jurisdiction to hold that the failure of the Maryland Casualty Company to deposit in the joint account either $7,500.00 or $12,000.00 was not a substantial breach of that contract. The only amount deposited either to pay wages due or toward the completion of the plastering contract was $5,700.00, according to the figure found in the opinion of the Court of Appeals, the amount which it was still obligated to pay was $7,800.00, and according to the figure testified to by Mr. Morley, the president of the Construction Company, and the witness for the Casualty Company, the total amount which the Casualty Co. fell short of paying was $12,000.00 (R. 76), so that the failure of the Maryland Casualty Company to deposit more than half of the amount it agreed to deposit cannot on the physical facts be held to be an unsubstantial failure to perform an unsubstantial part of the contract into which it entered and put in three written instruments. That failure caused the Bank to decline to advance $10,000.00 additional (R. 90.)

VII.

Respondent had no right to have the check or warrant impressed with a trust in its favor or in favor of persons supplying labor and materials since said check or warrant was received in the ordinary course of the contractor's business and constituted part of its resources in executing its contract with the United States. The statute prohibiting the assignment of claims against the Government denies such asserted right to respondent.

The rule stated in Section 203, U. S. C. Title 31, supplemented in *Kane et al.* v. *The First National Bank*

of El Paso, Texas, 56 Fed. (2d) 534, applies here. In that case, the Maryland Casualty Company, the above named plaintiff, intervened after the contractor went into bankruptcy. In that case the contractor deposited with a bank for collection checks received as partial payments on the contract. Before the checks were collected, the contractor advised the bank that it could not continue business and the bank credited the entire balance of the bankrupt's checking account upon notes held by the bank against the bankrupt. The opinion says:

> "Maryland Casualty Company intervened as permitted by Texas practice, and sought a judgment against the bank for the $10,000 arising from the Alpine check."

In discussing the merits of the claim of the Maryland Casualty Company to recover, the court said:

> "We are not advised of any statute which requires that payments duly made to a contractor for public work be handled by him in any special way, or be given any particular application. No such contractual obligation appears in this case. In the absence of statute or stipulation otherwise the general responsibility of the contractor is credited in contracting with him, and his general resources are drawn on by him in executing the contract. Money or checks paid to him as the work progresses are the property of the contractor unincumbered by any trust, just as are payments to others for goods manufactured or services performed. The contractor's banker may receive such checks and is not bound to see to their application, nor to ascertain the state of the contractor's account with each contract; nor, if he knows it, need he govern himself in anywise with references thereto. No wrong is done to the contractor's surety in recognizing the contractor's full

title to such checks by taking them on deposit with all the consequences ordinarily attaching to such deposit. The cases supposed to establish a trust in favor of the surety are based on *Prairie State Nat. Bank* v. *United States,* 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412. That case did not involve a payment made to the contractor, but involved the reserve kept back by the United States to secure final performance of the contract for which the surety on the bond had also bound himself. The surety having had to complete the contract claimed this reserve, which was still in the hands of the United States. The Prairie State Bank had only an invalid assignment of it. It was decided that this reserve was a security stipulated in the contract to be held by the creditor for the performance of the obligation, to which the surety became subrogated on performing the obligation just as he would be subrogated to any other security. The case has no application to money not reserved as a security but paid over to the contractor."

Hence, the Maryland Casualty Company, in the case at bar, was without right against the funds in question and without right to obtain any equitable relief.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that justice be done herein and that the conflicts on the important questions herein involved be corrected, and that to such end a writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Eighth Judicial Circuit and finally reverse it.

Respectfully submitted,

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